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SECRETARY, BOARD OF  
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
IN AND FOR THE STATE OF UTAH  
\*

IN THE MATTER OF THE BOARD ORDER \* MEMORANDUM OF POINTS AND  
TO SHOW CAUSE RE: POTENTIAL \* AUTHORITIES  
PATTERN OF VIOLATIONS, INCLUDING \*  
NOTICES OF VIOLATION N-91-35-1-1  
AND N91-26-7-2(#2), CO-OP MINING \* DOCKET NO. 92-041  
COMPANY, BEAR CANYON MINE,  
ACT/015/025, EMERY COUNTY, UTAH \* CAUSE NO. ACT/015/025

Comes now the Permittee, Co-op Mining Company, and submits the following Memorandum of Points and Authorities, regarding the res judicata effect of the finalized NOVs and assessments as the basis for the introduction of any evidence concerning the fact of violation or the assessment of negligence penalty points, at the formal hearing of this cause.

FACTUAL BACKGROUND

1. On February 27, 1991, the Division issued NOV N91-35-1-1 to Co-op, alleging that Co-op had constructed a road within the permit area prior to receiving authorization for the construction. The fact of violation was not appealed and the penalty assessed has been paid. See Division's Exhibit #2.

2. On April 26, 1991, the Division issued NOV N91-20-1-1 to Co-op, alleging that Co-op had failed to redo all

of its maps within the allotted time. The fact of violation was appealed, but was upheld at an informal assessment conference and the penalty assessed has been paid. See Division's Exhibit #3.

3. On July 2, 1991, the Division issued NOV N91-26-7-2(#2) to Co-op, alleging that Co-op had enlarged a shop pad prior to receiving Division authorization. Testimony was offered and received at the informal hearing held before the Division Director on July 8, 1992, that Co-op timely mailed a request for hearing to appeal the fact of violation, but the request was not granted as the Division claimed that the request was never received. The penalty assessed has been paid. See Division's Exhibit #4.

4. By letter dated May 15, 1992, Co-op was notified by the Division Director that she had determined that a potential pattern of violations existed at Bear Canyon Mine and that the Division would request the Board to issue an Order to Show Cause as to why Co-op's permit should not be revoked or suspended unless Co-op requested an informal conference wherein Co-op would be given an opportunity to prove that the violations were not caused by Co-op willfully or through unwarranted failure to comply. See Division's Exhibit #8.

5. Co-op requested the informal hearing and testimony was offered by Co-op and the Division and was received by the Division Director regarding the violations and particularly, the degree of negligence involved in each. See Division's Exhibit #9.

6. The Director determined that the evidence did not support a finding that NOV N91-20-1-1 was caused by Co-op's willful or unwarranted failure to comply, but determined that NOVs N91-35-1-1 and N91-26-7-2(#2) did constitute a pattern of violations caused by willful and unwarranted failure to comply. The Director recommended that the Board issue an Order to Show Cause, and recommended that Co-op's mining privileges be suspended for forty eight hours. See Division's Exhibit #9.

7. The Board issued its Order to Show Cause and Co-op appeared pursuant to the Order, prepared to Show Cause why NOVs N91-35-1-1 and N01-26-7-2(#2) did not constitute a pattern of violations caused by willful and unwarranted failure to comply.

8. After the Division rested its case at the Order to Show Cause hearing on October 28, 1992, counsel for the Division objected to the introduction of any evidence regarding willfulness or unwarranted failure on the part of Co-op, arguing that such matters had already been determined by the Division and were res judicata.

#### ISSUE

WHAT EFFECT, IF ANY, DOES THE DIVISION'S DETERMINATION OF NEGLIGENCE, IN ASSESSING MONETARY PENALTIES FOR THE NOVs, HAVE IN THIS PROCEEDING TO DETERMINE WHETHER OR NOT A PATTERN OF VIOLATIONS CAUSED BY WILLFUL AND UNWARRANTED FAILURE TO COMPLY EXISTS.

#### ARGUMENT

Administrative bodies are strictly creatures of and

created by statute. They have no general or common law powers, but only the powers and authority to act granted by the specific statutes creating them. Accordingly, one cannot look to the common law or to general legal precedent to determine the powers, authority or procedures delegated to an administrative body, unless the legal precedent deals with the administrative body at issue.

The writer could find no precedent, either from Utah cases or from other jurisdictions, which have dealt with the precise legal issue confronting the Board. Reported cases dealing with the binding effect of an administrative order or finding, necessarily involve cases where the administrative ruling is being challenged in a judicial forum rather than in another administrative forum, and are therefore, of limited precedential value. Also, such cases are divided as to whether or not a final administrative ruling which was not challenged or appealed, is binding in a subsequent judicial proceeding. The traditional view was that an administrative ruling was not binding in a later judicial forum, although some recent cases have adopted a contrary position, depending upon the circumstances. The following statement still seems to express the current sentiment on this issue.

"[T]he sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor." 2 K. Davis, Administrative Law Treatise §18.02 at 548 (1958).

In a case similar to ours which dealt with the res judicata effect of findings and conclusions of an administrative body, the Texas Court of Appeals ruled that even if a final order of the Administrative body could be given res judicata effect,

[a]n underlying finding or conclusion of an agency is not, of course, the equivalent of its final order...(p.252).

The Court then went on to say at page 253,

...an administrative determination should not be regarded as res judicata for the purpose of subsequent judicial proceedings. Although an agency decision may be binding on the agency, it will not be given res judicata effect in court. Champlin Exploration, Inc. v. Railroad Commission of Texas, 627 S.W.2d 250 (Texas 1982).

In the Champlin Case, *supra*, the Plaintiff attempted to challenge certain findings of the Railroad Commission, which is the State body which functions in Texas much as the Division and Board of Oil, Gas & Mining do in Utah. The Plaintiff did not challenge the final order of the Commission, but was dissatisfied with a finding that the Commission had made in fashioning its Order and feared that the finding might be used against it in subsequent proceedings. The Court refused to allow a challenge to the findings when the Order itself was not being challenged, holding specifically that the findings could have no res judicata or collateral estoppel effect in any subsequent proceedings.

In our case, Co-op is not challenging the final Orders on the NOV's involved, nor the amounts of the penalties assessed. In fact, the penalties have been paid and for purposes of this

Order to Show Cause hearing, Co-op will stipulate that the fact of the violations and the amounts of the penalties cannot now be challenged. However, the underlying "findings" of degree of fault of the Division at the assessment conference cannot be used against Co-op in this proceeding. The fact that the Division follows a certain formula and assesses a certain number of points, including points for "Degree of Fault", in arriving at the monetary penalty, cannot be used by the Board as the sole criteria in determining whether or not a pattern of violations, caused by the willful or unwarranted failure to comply, has occurred.

The State of Utah R645 - Coal Mining Rules, Rule R645-400-331, specifically states that the Board must determine "that a pattern of violations...exists...and that each violation was caused by the permittee willfully or through an unwarranted failure to comply with those requirements or conditions." (Emphasis added). The number of points assessed by the Division for "degree of fault" in assessing the monetary penalty for a NOV, has little if any persuasive authority for the Board, in its determination of whether or not a pattern of violation exists. As the Rule states, "A finding [which must be made by the Board, not the Division] of unwarranted failure to comply will be based upon a demonstration of greater than ordinary negligence on the part of the permittee."

The Division Director recognized that the "Degree of Fault" penalty points found by the assessment officer at the

assessment conference in assessing the monetary penalty could not be used as res judicata, to sustain without further evidence, that a pattern of violations existed. At the hearing before the Director, testimony was offered and accepted, regarding the degree of negligence in each of the three NOV's at issue, and in fact, the Director determined that based upon the evidence adduced at the hearing, there was no willfulness or unwarranted failure to comply with respect to one of the NOV's, despite the points assessed and the finality of the assessment Order. See paragraph 5 on page 6 of Division's Exhibit #9. Although the Director did determine, based upon the evidence presented at the informal hearing, that the other two NOV's did result from willful and unwarranted failure to comply, wherein she concluded that the "permitee was determined to have demonstrated greater than ordinary negligence" (paragraph 4 on page 6 of Division's Exhibit #9), her Informal Order did provide that Co-op could appeal the Informal Order (paragraph 4 on page 7 of Division's Exhibit #9). As stated in the Informal Order, this Order to Show Cause hearing constitutes the appeal of that Order. Clearly, where the Order is appealed, the findings and conclusions, including the evidence relied upon, is subject to review by the reviewing body. The Board's obligation is to review the Director's determination of a pattern of violations, including the required negligence finding within the subject NOV's, not a review of the fact of violation or even the degree of fault penalty points assigned in the underlying NOV's. A finding by the Division is not binding on

the Board, as the Rules presume that the Division Director has already found a pattern or the issue would not be before the Board. If the findings of the Division are binding on the Board, the Board serves no function or purpose and there would be no reason to schedule an Order To Show Cause hearing.

The Rules require the Board to examine two specific factors in making its determination of whether or not a pattern of violations exists: 1. That two or more violations occurred which constitute a pattern as defined in the Rules; and 2. That each violation in the suspected pattern was caused by the permittee willfully or through an unwarranted failure to comply. Rule R645-400-335.100 provides that in the Order to Show Cause hearing, "the Division will have the burden of establishing a prima facie case for suspension or revocation of the permit based upon clear and convincing evidence." (Emphasis added.) I would submit that merely showing that a certain number of points were assessed at an informal penalty hearing to determine whether or not a violation existed and what an appropriate fine would be, is not "clear and convincing evidence". This is particularly true where Co-op did not even appear and offer any evidence on the only two NOVs the Director determined constituted the pattern. In NOV N91-35-1-1, Co-op did not request an informal assessment conference, having determined that the finding of a violation would probably be affirmed and any savings from the proposed assessment realized by presenting mitigating testimony, would be more than offset by the expense of appearing to contest the

proposed assessment. In NOV N91-26-7-2(2), Co-op requested a conference, prepared to contest the fact of violation and the proposed assessment, but was given no opportunity to attend a conference, because the Division alleged that it did not receive Co-op's request.

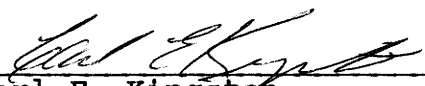
It is important to note that even if an informal assessment conference had been held, no official record of evidence presented at the conference would have been made, and in fact, Rule R645-401-760 prohibits the use of any evidence presented or statements made at the assessment conference, at any subsequent hearing before the Board. If the evidence given upon which the findings of "degree of fault" and other point assessments within the penalty point formula cannot be used in subsequent proceedings, it would seem ludicrous to allow the findings themselves to be res judicata, and it would seem to be the clear intent of the drafters of the Rules that no findings of the Division at the assessment conference level would be res judicata for any purpose, especially for a different proceeding, to determine whether additional penalties would be imposed against the operator, under the "pattern of violations" Rule.

A pattern of violations hearing presents an entirely new cause of action, very different from a penalty proceeding, seeks totally separate relief, requires different proof, and even technically involves a different party, i.e., the Board instead of the Division. As such, neither res judicata nor collateral estoppel applies. This is particularly true in light of the

rule prohibiting the introduction of evidence of negligence or degree of fault considered at the assessment conference, in hearings before the Board. Such evidence or findings of degree of fault are not part of the Order or Judgment of the penalty proceeding and cannot be used as evidence of negligence of the operator in this separate proceeding.

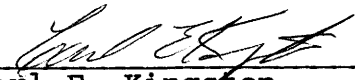
Finally, if the Board does determine that a pattern of violations exists and sanctions are warranted, the Board must examine the facts involved in the NOV's, including the degree of fault or negligence, in order to determine whether or not the recommendation of the Division Director, that Co-op be suspended from operating for forty eight hours, is reasonable under the circumstances. To allow the evidence for one purpose and prohibit it for another seems to serve no legitimate purpose. Since the Board must review evidence of negligence if a pattern is found to exist in any event, this fact alone would be enough under Professor Davis' view "to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reason against it outweigh those in its favor." 2 K. Davis, Administrative Law Treatise, supra.

Respectfully submitted this 10 day of December, 1992.

  
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Carl E. Kingston  
Attorney for Co-op Mining Co.

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the foregoing Memorandum to Thomas A. Mitchell, Esq., 355 West North Temple #350, Salt Lake City, Utah 84180, this 10 day of December, 1992, postage prepaid.

  
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Carl E. Kingston